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Region 17

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Division of Advice

Employers Reinsurance Corporation
Case 17-CA-15902

This case was submitted for advice as to whether (1) an employee engaged in protected concerted activity, and (2) if the employee did not engage in such activity, whether the Employer's actions nonetheless violated Section 8(a)(1) because the Employer's supervisor believed that the employee had engaged in such protected concerted activity.

We conclude that a Section 8(a)(1) complaint should issue, absent settlement.

Initially, we concluded that employee Louvenia Trigg would not have been engaged in concerted activity if all that were involved had been the activity of herself and another employee, Melanie Tull. The fact that they separately spoke to management representative James Cole about the same subject--their problems with their supervisor, Jude Sumnicht--does not make those conversations concerted in the absence of evidence that either employee was speaking on behalf of other employees.¹ The conversation that the two employees had in between their separate meetings with Cole was similarly unconcerted, since Trigg merely told Tull the subject of the meeting and told her to answer Cole's questions. Moreover, no supervisors witnessed that conversation. Further, the fact that Trigg had a conversation with other employees in June 1991, in which the employees decided not to complain to management about Sumnicht, does not require a contrary result. It does not appear that Sumnicht or any other representative of the Employer knew about either of those conversations.

However, Trigg's and Tull's conversations with Cole resulted in the memorandum, dated March 11, 1991, in which Cole placed Sumnicht on probation, and which stated, inter alia:

¹ See, e.g., Barnet of Indiana, 284 NLRB 1024, 1026-7 (1984) (Two employees did not engage in protected concerted activity when they responded to questions asked by OSHA inspector).

[Y]our staff are generally unhappy in their positions because of the harsh and abrupt treatment which they report they frequently receive from you....Louvenia Trigg and Melanie Tull...indicated that they found your methods of supervising to be all too often demeaning and unnecessarily harsh.

Thus, the Employer, by Cole's memorandum, treated the complaints of the two employees as joint complaints to such an extent that the Employer molded them into concerted activity. In addition to this theory of actual concert, it is clear that Sumnicht believed (even if mistakenly) that Trigg and Tull had concertedly complained about her and had caused her probation. The fact that Sumnicht knew that Cole, not Trigg and Tull, had initiated the separate discussions concerning Sumnicht does not lead to a contrary result. In determining whether an employee's statement is concerted, the Board focuses on the content of the statement, not on whether the employee initiated the conversation or spoke in response to statements or questions from an employer representative. Clearly Cole's memorandum to Sumnicht led the latter to believe that the two employees had spoken in concert as demonstrated by Sumnicht's subsequent statements to Trigg and Tull. Thus, on separate occasions after she had received Cole's memorandum, Sumnicht said, "You two [Trigg and Tull] had no business trying to sabotage me," and, "You [Trigg] and Melanie [Tull] did go upstairs and tell Jim [Cole] that I was a bad supervisor." Sumnicht allegedly also said that Tull and Trigg "had not stood behind" her when they spoke to Cole. Sumnicht had admittedly had problems dealing with all of the employees in the unit and with other divisions at the Employer's facility, but her statements referred specifically to the conversations that Trigg and Tull had with Cole. ²

R.E.A.

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² See, e.g., Monarch Water Systems, Inc., 271 NLRB 558 (1984) (Board concluded that employer had a mistaken belief that employee had engaged in concerted activity where employer had previously told employee not to talk to a former employee about company business and Department of Labor sent compliance letter to employer stating that both former and current employees were entitled to backpay).